No. 92-2058

In the Supreme Court of the United States

OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC., ET AL., PETITIONERS

v.

GRANT T. NORRIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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36 pp

QUESTION PRESENTED

Whether respondent's state law wrongful discharge claims are preempted by the Railway Labor Act, 45 U.S.C. 151 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulations and rule:

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INTEREST OF THE UNITED STATES

The question presented in this case is whether the Supreme Court of Hawaii erred in concluding that respondent's state law wrongful discharge claims are not preempted by the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.* The RLA is designed to prevent the interruption of interstate commerce and to provide an exclusive mechanism for the prompt and orderly resolution of all disputes in the covered industries "growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a. The United States has a substantial interest in furthering the purposes served by the Act and its exclusive arbitral mechanism, while at the same time avoiding unnecessary encroachment upon the ability of the

States to legislate on matters of legitimate state concern. At the Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

STATEMENT

1. Petitioner Hawaiian Airlines, Inc. (HAL), employed respondent as an aircraft mechanic. Respondent's license, issued by the Federal Aviation Administration (FAA), authorized him to approve an aircraft for service after making, supervising, or inspecting repairs. He was not authorized to approve for service any aircraft the repairs of which did not conform to applicable federal regulations. The FAA may suspend or revoke the license of a mechanic who makes a fraudulent entry in any record or report required by those regulations. Pet. App. 7a.

During a routine inspection on July 15, 1987, respondent noticed that one of the tires on an HAL DC-9 was worn. After removing the tire and bearing, he and other mechanics noticed that the axle sleeve, which is normally mirror-smooth, was scarred and grooved. Although respondent and the other mechanics believed that the axle sleeve was therefore unsafe and in need of replacement, respondent's supervisor, Justin Culahara, ordered the mechanics to sand the sleeve by hand and put a new bearing and tire over it. After the specified repairs were performed, the plane made its scheduled flight. Pet. App. 7a.

At the end of respondent's shift, Culahara directed him to sign the maintenance record for the installation of the tire. Under applicable federal regulations (14 C.F.R. 43.9(a)), that record would have served to certify that the repair work had been satisfactorily performed. Respondent refused to sign the form on the ground that the sleeve was still unsafe. He said that he would sign the form only if Culahara could show him that the DC-9 manual indicated that the axle sleeve was in satisfactory condition. Culahara told respondent he would be discharged if he did not sign. When respondent persisted in his refusal,

he was immediately suspended pending a termination hearing. Respondent subsequently reported to the FAA that there was a problem with an HAL aircraft that he had serviced. Pet. App. 7a-8a.

On July 31, 1987, respondent was represented by a union representative at a so-called "Step 1" grievance hearing. Three days later, the hearing officer recommended that respondent be terminated for insubordination.[1] Pet. App. 63a-65a. Respondent then invoked the grievance procedures available under the applicable collective bargaining agreement, which provides that an employee may be discharged only for "just cause" and may not be disciplined for refusing to perform work in violation of a health or safety law. *Id.* at 8a. The grievance process proceeded to "Step 3," which entails a hearing before the head of the department in which the employee works. *Id.* at 9a & n.6, 51a. Prior to the hearing, HAL offered to reduce the punishment to suspension without pay for six weeks. Respondent never replied to the offer or, apparently, took further steps to pursue the grievance. *Id.* at 9a.

2. a. This case is a consolidation of two lawsuits relating to respondent's discharge. On December 8, 1987, respondent filed an action in state court against HAL. *Norris* v. *Hawaiian Airlines, Inc.*, Civ. No. 87-3894-12 (Haw. Cir. Ct., 1st Cir.); Pet. App. 9a. He alleged that HAL discharged him in violation of the public policy expressed in the Federal Aviation Act and implementing regulations (Count I); that HAL's actions violated the Hawaii Whistleblower's Protection Act (HWPA), Haw. Rev. Stat.

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[1] After respondent's discharge, he gave the FAA details of what had occurred on July 15, 1987. On August 4, 1987, the FAA seized the axle sleeve and initiated an investigation. The FAA broadened its investigation to other HAL planes. Pet. App. 8a. On March 2, 1988, the FAA proposed a civil penalty concerning the damaged sleeve. The FAA and HAL later settled the case. J.A. 292-294.

§§ 378-61 to 378-69 (1994) (Count II);[2] that HAL intentionally inflicted emotional distress on him (Count III); that HAL engaged in outrageous conduct, entitling him to punitive damages (Count IV); and that HAL breached the collective bargaining agreement (Count V). See 12/8/87 Compl. ¶¶ 22, 28, 31, 33, 39; J.A. 7-10.

HAL removed the case to the United States District Court for the District of Hawaii. On March 28, 1988, the district court dismissed Count V, holding that it was subject to the exclusive arbitral procedures of the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and therefore preempted. 3/28/88 Dist. Ct. Order 14-15; J.A. 342-344. The court remanded the remainder of the claims to the state trial court. 3/28/88 Dist. Ct. Order 16-17; J.A. 344-345; Pet. App. 9a n.7.

On December 5, 1990, the state trial court dismissed Count I of the complaint against HAL, reasoning that it lacked subject-matter jurisdiction because respondent's claim was preempted by the RLA. See 12/5/90 Haw. Cir. Ct. Order 2; Pet. App. 28a. The court certified its order as final under state rules of civil procedure (Haw. R. Civ. P. 54(b)) so that respondent could take an immediate appeal. 12/5/90 Haw. Cir. Ct. Order 2.[3]

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[2] The Hawaii Whistleblower's Protection Act provides in pertinent part that an employer "shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because * * * [t]he employee * * * reports or is about to report to a public body * * * a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false." Haw. Rev. Stat. § 378-62(1) (1994). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. Haw. Rev. Stat. § 378-63(a) (1994).

[3] Although the Hawaii Supreme Court vacated the state trial court's initial order because the federal district court's remand order was not part of the record (Pet. App. 9a n.7), the remand order was later made part of the record, the judgment of dismissal was reinstated, and petitioner took a fresh appeal from that judgment. *Id.* at 28a.

b. On September 20, 1989, respondent filed suit against petitioners Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma, all of whom where officers of HAL when respondent was discharged. *Norris* v. *Finazzo*, Civ. No. 89-2904-09 (Haw. Cir. Ct., 1st Cir.); Pet. App. 9a-10a. Respondent alleged that the individual petitioners directed, confirmed, or ratified the alleged retaliatory discharge. He again sought relief on theories of discharge in violation of public policy (Count I); violation of the HWPA (Count II); intentional infliction of emotional distress (Count (III); and outrageous conduct entitling him to punitive damages (Count IV). 9/20/89 Compl. ¶¶ 22, 28, 31, 33; J.A. 16-18. On December 5, 1990, the state trial court dismissed Counts I and II and certified the case for immediate appeal. 12/5/90 Haw. Cir. Ct. Order 2-3.

3. The Supreme Court of Hawaii reversed in both cases. Pet. App. 1a-26a (*Finazzo*); *id.* at 27a-29a (*Hawaiian Airlines, Inc.*). The court first observed that respondent's retaliatory discharge claims are subject to the RLA's exclusive arbitral mechanism (and are therefore pre-empted) if they are "minor disputes" for purposes of the RLA, *viz.*, if they are disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 U.S.C. 153 First (i)). Pet. App. 12a. The court concluded that respondent's claims are not pre-empted under that standard.

Relying on this Court's decision in *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 305 (1989), the state supreme court explained that "minor disputes" are "those that 'may be conclusively resolved by interpreting the existing [collective bargaining] agreement.'" Pet. App. 14a. In the court's view, the retaliatory discharge claims could not be resolved in that way: "[Respondent's] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a

retaliatory discharge is sanctioned or justified by a provision in the [collective bargaining] agreement nor do they point to any part of the [agreement that] demonstrates that the carrier and union have agreed on standards relevant to [respondent's] situation." *Id.* at 19a.

The court rejected petitioners' argument that the retaliatory discharge claims are preempted because it is necessary to construe the collective bargaining agreement to determine whether HAL had terminated respondent for insubordination, and thus for "just cause." Pet. App. 18a-19a. The court pointed out that in *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185, this Court held that a claim of wrongful termination in retaliation for filing a state worker's compensation claim did not require interpretation of a collective bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. Pet. App. 15a-16a. The Supreme Court of Hawaii determined that, as in *Lingle*, the claims in this case do not turn upon an interpretation of the labor contract, but upon "purely factual questions [that] pertain[] to the conduct of the employee and the conduct and motivation of the employer." Pet. App. 19a (quoting *Lingle*, 486 U.S. at 407).

SUMMARY OF ARGUMENT

A. The Railway Labor Act (RLA), 45 U.S.C. 153 First (i), establishes an exclusive arbitral mechanism for so-called "minor disputes," which are disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." This Court has explained that arbitration of minor disputes is compulsory and binding, and that States may not supplement the Act's arbitral remedy for minor disputes with state law judicial remedies.

B. The test for whether an employee's claim is a "minor dispute" subject to the Act's exclusive arbitral mechanism

is whether the claim can be "conclusively resolved" under the collective bargaining agreement. *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 305 (1989). Applying that test, the Supreme Court of Hawaii properly held that petitioner's state law tort claims are not preempted. Because respondent's claims are independent of any right he may have under the collective bargaining agreement and require proof that petitioners discharged him for a retaliatory motive that is impermissible under state tort law—and because the agreement would not justify a discharge that was so motivated—respondent's claims cannot be conclusively resolved by interpreting the labor contract.

C. Petitioners err in contending that the language of the RLA requires preemption of extra-contractual claims because it applies to disputes "growing out of grievances *or* out of the interpretation or application" of the contract. 45 U.S.C. 153 First (i) (emphasis added). This Court has recognized that the word "or" does not necessarily require that phrases separated by the "or" be given independent meaning. The term "grievance," moreover, is commonly understood in the labor law context to refer to claims arising out of a collective bargaining agreement. The legislative history of the 1926 and 1934 legislation establishing the RLA's arbitral mechanism does not warrant a different conclusion.

In any event, this Court has since held that the preemptive force of the RLA's arbitral mechanism arises from the existence of a contract claim, *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320 (1972), and that the RLA's arbitral mechanism does not bar the imposition of tort duties independent of the collective bargaining agreement or preempt the field of regulation of working conditions themselves. *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557 (1987); *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714

(1963); *Terminal R.R. Ass'n* v. *Brotherhood of R.R. Trainmen*, 318 U.S. 1 (1943).

D. This Court's decisions addressing labor preemption under Section 301(a) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 185(a), provide a pertinent analogy for RLA preemption cases. The question addressed in both RLA and LMRA preemption cases is the same: how to accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legiti-mate interests of the States in regulating the conduct of employers subject to their police power.

ARGUMENT

RESPONDENT'S STATE TORT CLAIMS CANNOT BE CONCLUSIVELY RESOLVED BY INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT AND ARE THEREFORE NOT "MINOR DISPUTES" SUBJECT TO THE EXCLUSIVE ARBITRAL MECHANISM OF THE RAILWAY LABOR ACT

A. The Railway Labor Act Establishes An Exclusive Arbitral Mechanism For "Minor Disputes"

The Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, was enacted, *inter alia*, to establish a mechanism for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a(5). As this Court has explained, these so-called "minor disputes," *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946), involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 33 (1957); see also

Pittsburgh & L.E. R.R. v. *Railway Labor Executives' Ass'n*, 491 U.S. 490, 496 n.4 (1989) (same).[4]

The RLA establishes an elaborate arbitral mechanism for the resolution of minor disputes. See 45 U.S.C. 153 First (i) (railroad industry); 45 U.S.C. 184 (airline industry). It requires that minor disputes first be submitted to a carrier's "internal dispute resolution processes." *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557, 563 (1987); 45 U.S.C. 153 First (i), 184. If the dispute cannot be resolved internally, either party may refer it to arbitration before the National Railroad Adjustment Board (NRAB) or an adjustment board established by the employer and unions. *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 303-304 (1989) (*Conrail*); see also 45 U.S.C. 153 First (i) and Second, 184.[5]

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[4] This Court adopted the "major/minor" dispute terminology "from the vocabulary of rail management and rail labor." *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989) (*Conrail*). The term "major dispute" refers to "disputes over the formation of collective agreements or efforts to secure them," *Burley*, 325 U.S. at 723, or over "proposals to change rates of pay, rules, or working conditions," *Pittsburgh & L.E. R.R.*, 491 U.S. at 496 n.4. In the case of a "major dispute," the RLA requires the parties "to undergo a lengthy process of bargaining and mediation." *Conrail*, 491 U.S. at 302; see 45 U.S.C. 152 Seventh, 155, 156. Petitioners do not argue that the claims in this case constitute "major disputes." See Br. 11 n.3.

[5] The NRAB consists of 34 members, half of whom are selected by railroads and half of whom are selected by national labor organizations. 45 U.S.C. 153 First (a). The Act also provides that "any individual carrier, system, or group of carriers and any class or classes of its or their employees" may agree to establish "system, group, or regional" boards of adjustment. 45 U.S.C. 153 Second. The arbitral scheme differs somewhat for the airline industry, to which Congress extended the RLA in 1936. See Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189; 45 U.S.C. 181-188. The principal difference between the two statutory schemes, which is not material here, is that Congress left the creation of a national adjustment board for airlines to the discretion of the National Mediation Board. See 45 U.S.C. 185; *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 685-686 (1963). In the absence of a national board, minor disputes are adjudicated exclusively

The submission of a minor dispute to arbitration is "compulsory and binding" upon the parties. *Conrail*, 491 U.S. at 303-304; see 45 U.S.C. 153 First (i). "Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation." *Burley*, 325 U.S. at 727; see 45 U.S.C. 153 First (i). And the decision of an adjustment board arbitrating a minor dispute is expressly made "final and binding upon both parties to the dispute." 45 U.S.C. 153 First (m); see *Chicago R. & I. R.R.*, 353 U.S. at 35.[6]

This Court has interpreted the RLA's compulsory arbitration provisions to preclude resort to judicial remedies for minor disputes other than the judicial review provisions of the RLA itself. See *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320 (1972). In *Andrews*, the Court held that a railroad employee's state law wrongful discharge claim is subject to the RLA's exclusive arbitral mechanism where the "source of [the employee's] right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement"—*i.e.*, if "[the

by system adjustment boards formed by the airlines and unions under 45 U.S.C. 184. See *Conrail*, 491 U.S. at 304 n.4.

[6] The compulsory aspect of the statutory scheme was a product of the 1934 amendments to the RLA. See H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-4 (1934). Under the 1926 version of the Act, the formation of boards of adjustment to resolve minor disputes was left to the agreement of the parties. Railway Labor Act of 1926, ch. 347, § 3, 44 Stat. 578-579. Under that system, each party could "defeat the intended settlement of grievances by declining to join in creating the local boards of adjustment provided for by the Act." *Burley*, 325 U.S. at 726. As a result, the machinery quickly broke down, and grievances accumulated to the point that on several occasions employees resorted to the issuance of strike ballots and threats to disrupt commerce. H.R. Rep. No. 1944, 73d Cong., 2d Sess. 3 (1934). Congress in 1934 established the present system, creating the NRAB and vesting it and other adjustment boards with authority finally to resolve minor disputes. See *Chicago R. & I. R.R.*, 353 U.S. at 35-39; Act of June 21, 1934, ch. 691, § 3, 48 Stat. 1189-1192.

employee's] claim, and [his employer's] disallowance of it, stem from differing interpretations of the collective-bargaining agreement." *Id.* at 324. Finally, a party who has litigated an issue before an adjustment board may not relitigate the issue in a separate judicial proceeding, but may seek only the limited judicial remedy available under the review provisions of the RLA. *Id.* at 325; see *Gunther* v. *San Diego & A. E. Ry.*, 382 U.S. 257, 261-264 (1965).[7]

B. Respondent's State Tort Claims Are Not "Minor Disputes" Because They Cannot Be Conclusively Resolved By Interpreting The Collective Bargaining Agreement

1. The RLA does not generally impose substantive limitations on the States' police power, or authorize parties to a collective bargaining agreement to agree to that which State law prohibits as a matter of public policy and places beyond the parties' power to contract away. See *Terminal R.R. Ass'n* v. *Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6-7 (1943); *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963); see also *Buell*, 480 U.S. at 563-565; cf. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 212 (1985). Rather, because the RLA's preemption of state law remedies results directly from its channeling of minor disputes through the exclusive arbitration scheme, the question of preemption in this case turns on whether respondent's claims are minor disputes, that is, whether they are

[7] The Court in *Andrews* overruled *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941). See 406 U.S. at 326. In *Moore*, the Court had permitted a railroad employee to bring a state law damage action alleging "that he had been wrongfully discharged contrary to the terms of a [labor] contract." 312 U.S. at 632. That holding was premised on the notion that the RLA's arbitral procedures were intended "to be optional, not compulsory, and that therefore a State was free to accord an alternative remedy to a discharged railroad employee under its law of contracts." *Andrews*, 406 U.S. at 321-322. The Court in *Andrews* concluded that the premise of *Moore* "was never good history and is no longer good law." *Id.* at 322.

"disputes * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. 153 First (i).

The proper framework for evaluating the existence of a minor dispute is set forth in this Court's decision in *Conrail*. There, the Court addressed whether a dispute about the carrier's implementation of an employee drug testing program was a "major dispute" concerning a change in the collective bargaining agreement (subject to the RLA's bargaining and mediation provisions, see note 4, *supra*) or a "minor dispute" (subject to compulsory arbitration). In holding that the drug testing controversy was a minor dispute, the Court looked "to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." 491 U.S. at 305. As the Court explained, "[t]he distinguishing feature of such a case [*i.e.*, a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Ibid.*[8]

2. The holding by the Supreme Court of Hawaii that respondent's tort claims for retaliatory discharge are not minor disputes (Pet. App. 10a-20a) is supported by *Conrail*, because those claims cannot be "conclusively resolved" (491 U.S. at 305) by interpreting the collective bargaining agreement. Respondent's first claim—alleging retaliatory discharge in violation of public policy—requires proof that the termination "violate[d] a clear mandate of public policy." Pet. App. 20a-21a. As the Supreme Court of Hawaii explained, if HAL dismissed respondent in order to

[8] The Court made plain that a party may not trigger the RLA's arbitral mechanism by asserting a contract right on "insubstantial grounds." *Conrail*, 491 U.S. at 306. When an employer asserts "a contractual right to take [a] contested action, the ensuing dispute is minor [only] if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 307.

punish him for trying to rectify an alleged safety infraction, that action would violate the policy "of the Federal Aviation Act and [implementing regulations] to protect the public from shoddy repair and maintenance practices." *Id.* at 21a.[9] Respondent's second claim, which arises under the HWPA, also does not turn on the meaning of the collective bargaining agreement;[10] it merely calls for proof that HAL discharged respondent because he reported the safety infraction to the FAA. *Id.* at 21a-22a.[11]

[9] Hawaii law makes the tort of wrongful discharge in violation of public policy available regardless of whether a worker is employed at-will or protected by a collective bargaining agreement. Pet. App. 20a-21a.

[10] The HWPA provides that it should not be construed to diminish an employee's rights under a collective bargaining agreement, but that it shall "supersede and take precedence over the rights, remedies, and procedures provided in [such] agreements" if the rights and remedies are inferior. Haw. Rev. Stat. § 378-66(b) (1994).

[11] For an employee working in the railroad rather than the airline industry, a state law whistleblower claim may be preempted by the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. 431 *et seq.* The FRSA provides that common carriers by railroad "may not discharge or in any manner discriminate against any employee because such employee * * * has—(1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or (2) testified or is about to testify in any such proceeding." 45 U.S.C. 441(a). The FRSA contains an express preemption provision that would appear to preempt certain state whistleblower laws. See 45 U.S.C. 434; *Rayner* v. *Smirl*, 873 F.2d 60, 64-66 (4th Cir.), cert. denied, 493 U.S. 876 (1989)

The FRSA also provides that "[a]ny dispute, grievance, or claim arising under this section" is subject to the arbitral remedy provided by the RLA. See 45 U.S.C. 441(c)(1) (referring claims to arbitration under 45 U.S.C. 153). Petitioners argue (Br. 12-14) that the FRSA thus demonstrates Congress's intent to have whistleblower claims adjudicated under that arbitral mechanism. To the contrary, if retaliatory discharge claims in the railroad industry were generally preempted as "minor disputes" subject to Section 153 First (i), Congress would not have found it necessary to invoke the RLA's arbitral mechanism expressly in Section 441(c)(1).

Accordingly, as the state supreme court explained, the tort claims in this case turn on a factual dispute about whether HAL terminated respondent based on an impermissible motive—because he engaged in conduct protected by state tort law, independent of any contract rights of respondent or HAL. The collective bargaining agreement cannot eliminate such substantive legal protections provided to employees independent of the agreement. See *Buell*, 480 U.S. at 563-565; *Colorado Anti-Discrimination Comm'n*, 372 U.S. at 724. Moreover, the elements of the tort and contract claims and defenses are distinct. Respondent cannot prevail on his tort claims merely by proving that HAL lacked "just cause" to dismiss him under the collective bargaining agreement, because the torts alleged require proof of unlawful purpose to punish respondent for rectifying safety violations or reporting them to the FAA. Conversely, even if the state court were to find that respondent committed insubordination under the contract by refusing "to sign work records in connection with the work he performed" (Pet. App. 49a (Art. IV ¶ D.4(a))), that finding could not "arguably justif[y]" (*Conrail*, 491 U.S. at 307) a discharge motivated by the desire to penalize respondent for rectifying or reporting a safety infraction. Thus, the court below correctly determined that this case does not present a minor dispute subject to the RLA's exclusive arbitral mechanism because "[respondent's] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the agreement." Pet. App. 19a.[12]

[12] Petitioners argue (Br. 34) in this Court that respondent's claims are preempted because the state court must construe the collective bargaining agreement to determine if respondent was "discharged." Petitioners have provided no basis, however, for concluding that the Hawaii tort of retaliatory discharge in violation of public policy or of the HWPA depends on a finding of "discharge" as defined by the labor contract, rather than by state tort law.

C. Neither The Text Nor The History Of The Railway Labor Act Supports The Broad Preemption Of State Tort Law Urged By Petitioners

Petitioners contend (Br. 26-27, 48-49) that *Conrail* does not supply the appropriate framework for evaluating RLA preemption. They argue (Br. 10-11) instead that the RLA's compulsory arbitral mechanism—which applies to disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. 153 First (i)—extends not merely to contract claims, but to any claim arising out of disciplinary action in an employment setting covered by the Act.

1. a. Contrary to petitioners' argument (Br. 10-11), the language of Section 153 First (i) does not indicate that the class of "grievances" necessarily encompasses all claims touching upon the employment relationship, regardless of whether they are based on contractual rights. First, although the Act applies to disputes "growing out of grievances *or* out of the interpretation or application" of a collective bargaining agreement (45 U.S.C. 153 First (i) (emphasis added)), this Court has recognized that the word "or" is not necessarily disjunctive and that "or" does not always require that the phrases it separates be given independent meaning. See, *e.g.*, *United States* v. *Olano*, 113 S. Ct. 1770, 1776-1777 (1993); *McNally* v. *United States*, 483 U.S. 350, 358-359 (1987).[13] Second, although the term "grievance" might in theory be used more broadly, it is

[13] See also *Webster's Third New International Dictionary* 1585 (1986) (the word "or" may be used "to indicate * * * (3) the synonymous, equivalent, or substitutive character of two words or phrases <fell over a precipice [or] cliff> <the off [or] far side> <lessen [or] abate>; (4) correction or greater exactness of phrasing or meaning <these essays, [or] rather rough sketches> <the present king had no children—[or] rather no legitimate children * * *>").

commonly used in the labor law context to refer to claims arising out of a collective bargaining agreement. See, *e.g.*, *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 36 (1987) ("[c]ollective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement"); 29 U.S.C. 173(d) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."). Although there is inevitable overlap between the phrases separated by the "or" in Section 153 First (i) under any reading of that provision,[14] this Court's cases demonstrate that that is too slender a basis for construing the RLA to preempt all tort duties related to employment covered by the Act.[15] See pp. 19-26, *infra*.

[14] Petitioners have not identified any dispute growing out of the interpretation or application of a collective bargaining agreement that could not be treated as a "grievance." Thus, even under petitioners' construction of the RLA, Congress's inclusion of a reference in Section 153 First (i) to disputes "growing out of grievances *or* out of the interpretation or application" of a labor contract would make one of the alternatives superfluous (emphasis added)).

[15] Although the legislative history does not give a clear explanation of why the term "grievances" was included in Section 153 First (i), there is a plausible explanation for Congress's decision to include additional language to make its intent unmistakable. As this Court has explained, a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate," and it "calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960). The express terms of such agreements are thus inevitably supplemented by "practice, usage and custom." *Conrail*, 491 U.S. at 311-312. Although claims based on practice or custom are appropriately regarded as an incident of the contractual relationship between the employer and union, inclusion of the term "grievances" in Section 153 First (i) serves to foreclose any contention that arbitration is unavailable for claims that are not based on the

b. Petitioners argue (Br. 15-16) that the legislative history of the RLA shows that the term "grievances" extends to workplace disputes outside the collective bargaining agreement. It is true that when the relevant language was first enacted in 1926, see Railway Labor Act, ch. 347, § 3(c), 44 Stat. 578, some Members of Congress made floor statements that could, in isolation, be read to suggest that the class of "grievances" is not coterminous with the class of disputes arising from the contract. See, *e.g.*, 67 Cong. Rec. 4517 (1926) (Rep. Barkley) (referring to "disagreements over grievances, interpretations, discipline, and other technicalities"); *id.* at 8807 (Sen. Watson) (discussing "grievances" and observing that "[o]f this class, also, are disputes rising out of the interpretation or application of existing agreements"). Those stray remarks, however, are inconclusive. There were other floor statements (some by the same Members quoted above) that equated "grievances" with questions of contract interpretation, thereby foreclosing the assertion that the term "grievance" was generally understood to encompass extra-contractual disputes. See, *e.g.*, *id.* at 4510 (Rep. Barkley) ("There are two sorts of disputes that arise on railroads. One kind is a dispute growing out of the interpretation of agreement[s] as to wage scales or working conditions that already exist. These disputes might be termed grievances."); *id.* at 8808 (Sen. Watson) (noting that under previous law, "boards of adjustment * * *, as in this bill provided, had to do only with grievances—that is to say, with the interpretation and the application of existing agreements as to wages, hours of labor, and conditions of service"). Because the preemption of employment standards "within the traditional police power of the State[s]" "should not be lightly inferred," *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 21 (1987),

express terms of the collective bargaining agreement, but on the practice, usage, and custom of the workplace.

the inconclusive nature of the legislative materials surrounding the 1926 enactment of the RLA weighs heavily against fashioning a broad rule of preemption on the basis of those materials.

Moreover, when Congress amended the RLA in 1934 to make the arbitral mechanism compulsory for minor disputes, the accompanying House Report stated: "The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions." H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-3 (1934). Although there was little discussion of the meaning of minor disputes in 1934, the House Report indicates that at the point when Congress made the RLA's grievance machinery exclusive, the word "grievances" was considered synonymous with disputes growing out of collective bargaining agreements. See also Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 567 (1937) (describing function of NRAB as being to "render[] judicially enforceable decisions in controversies arising out of the interpretation of contracts"); National Mediation Board, First Ann. Rep. 25-26 (1935) (likening arbitration of minor disputes to interpreting business contracts).[16] Finally, the legislative history of the RLA in

[16] Petitioners argue that Congress's extension of the RLA to the airline industry in 1936 shows that the term "grievances" includes noncontractual claims. Specifically, petitioners rely on the statement in a House Report that boards of adjustment would be set up immediately under the 1936 amendments, even though there were as yet no collective bargaining agreements in effect in the airline industry. Br. 18 (discussing H.R. Rep. No. 2243, 74th Cong., 2d Sess. 1 (1936)). In fact, the House Report recognized that there would be a delay in the need for an arbitral mechanism precisely because of the absence of collective bargaining agreements. The 1936 Act, unlike the 1934 Act, did not immediately establish a national board of adjustment for the airline industry. See Act of Apr. 10, 1936, ch. 166, § 205, 49 Stat. 1190. Rather, as the House Report explained:

> Under Title II a similar board [*i.e.*, one similar to the National Railroad Adjustment Board] is established to handle similar matters [*i.e.*, minor disputes] for air transportation * * *. This new adjustment board will be created and will function in the same manner as the railway board, excepting that it need not be established immediately but only when deemed necessary by the Mediation Board. *The reason for the permissive delay in its formation is that there is nothing for such a board to do until employment contracts have been completed, and there are no such contracts in operation now.*

H.R. Rep. No. 2243, *supra*, at 1 (emphasis added). Although the Act contemplated a more immediate establishment of system, group, or regional boards, "it was thought that temporary boards might be created under this power to settle individual disputes pending the time when the volume of disputes warranted the creation of a full-time board." *Ibid.* Thus, the 1936 House Report merely shows that the system, group, or regional adjustment boards were to be set up as needed to handle the same disputes that would ultimately be handled by the national board. In any case, even if Congress believed that there might be some form of precontractual disputes arising out of (and defined by) the employment relationship that could be submitted to arbitration, that does not support the further conclusion that boards of adjustment in 1936 were charged with handling state law tort claims.

general gives no indication that in providing for the arbitration of minor disputes, Congress ever intended the Act's arbitral machinery to displace independent state tort remedies for railroad and airline workers who sustain work-related injuries.

2. In any case, two related lines of this Court's precedents squarely foreclose petitioners' broad view of the preemptive force of the RLA. First, the Court has held that the trigger for the RLA's exclusive arbitral mechanism is the existence of a dispute that can be conclusively resolved by construing the contract, that is, a claim of legal right that can be established or defeated by provisions of the contract. Second, the Court has also held that the RLA does not preempt substantive regulation of

the railroad and airline industries or foreclose the application of tort remedies to enforce those substantive standards.

a. As explained above, this Court in *Conrail* held that the "distinguishing feature" of a minor dispute "is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." 491 U.S. at 305. Petitioners argue (Br. 48-49) that *Conrail* is not determinative here because its test was articulated in the context of distinguishing a "major dispute" from a "minor dispute" under the Act, and not in the context of deciding what constitutes a "minor dispute" for purposes of the preemption of remedies outside the Act. Petitioners' asserted distinction, however, does not withstand analysis. As discussed above (see pp. 10-11, *supra*), the basis for preemption under the RLA is that minor disputes are channeled to an exclusive arbitral process that allows only limited avenues for judicial review. It follows that the preemption inquiry necessarily turns on the same question that was addressed in *Conrail*—whether the case presents a dispute "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. 153 First (i). There is no basis for construing the same terms differently here. Cf. *Ratzlaf* v. *United States*, 114 S. Ct. 655, 660 (1994) (a single statutory phrase should be read "the same way each time it is called into play").

Further, this Court's analysis in *Andrews* confirms that the test for preemption turns on whether the state law claim asserted by a railroad employee is based on the collective bargaining agreement. As pointed out in note 7, *supra*, the Court in *Andrews* overruled its decision in *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941), and held that the RLA's exclusive arbitral mechanism preempts alternative state law remedies for minor disputes. In so doing, the Court rejected Andrews' argument that his claim (that his employer improperly refused to

reinstate him after an automobile accident) was saved from preemption because Andrews had styled it a "wrongful discharge" claim. The Court explained (406 U.S. at 324):

> Here it is conceded by all that the only source of [Andrews'] right not to be discharged, and therefore to treat an alleged discharge as a "wrongful" one that entitles him to damages, is the collective-bargaining agreement * * *. [The employer] in this case vigorously disputes any intent on its part to discharge [Andrews], and the pleadings indicate that the disagreement turns on the extent of [its] obligation to restore [Andrews] to his regular duties following injury in an automobile accident. The existence and extent of such an obligation in a case such as this will depend on the interpretation of the collective-bargaining agreement. Thus [Andrews'] claim, and the [employer's] disallowance of it, stem from differing interpretations of the collective-bargaining agreement. * * * His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment.

If the exclusive arbitral mechanism of the RLA applied to any work-related claim, irrespective of its basis in the contract, then the Court's analysis tying Andrews' claim to the contract would have been entirely unnecessary; it would have been sufficient to note that Andrews' claim arose out of a potentially grievable employment dispute subject to the RLA. But given the Court's extensive analysis establishing that the "source of [Andrews' claimed] right not to be discharged[] * * * [was] the collective-bargaining agreement" (406 U.S. at 324), the contractual nature of the claim was necessarily a crucial factor in the Court's finding preemption.[17]

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[17] See also, *e.g.*, *Pittsburgh & L.E. R.R.*, 491 U.S. at 496 n.4 (minor disputes "are those involving the interpretation or application of existing contracts"); *Chicago R. & I. R.R.*, 353 U.S. at 33 (minor

b. In a closely related line of cases, this Court has also held that the RLA does not preclude enforcement of claims based on substantive regulatory guarantees that operate independently of the collective bargaining agreement. In *Atchison, T. & S.F. Ry.* v. *Buell*, *supra*, the Court rejected the contention that a personal injury claim brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, was barred by the RLA because the alleged workplace defects giving rise to his FELA claim might also have been the proper subject of grievance procedures as a minor dispute. The Court recognized that the railroad's duty to use reasonable care "was recognized at common law, * * * is given force through the [FELA] * * *, and is confirmed in some, if not all, collective-bargaining agreements." 480 U.S. at 558.[18] But it rejected the argument that Buell's tort claim was barred simply because the alleged injury arose from conduct "that may have been subject to arbitration under the RLA." *Id.* at 564. The Court reasoned that "notwithstanding the strong policies encouraging arbitration, 'different con-siderations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" *Id.* at 565. It added that the FELA "not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the

disputes are "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation"); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 243 (1950) (arbitral mechanism is meant "to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements").

[18] In fact, Buell had taken "preliminary though abortive steps" to invoke the grievance machinery. 480 U.S. at 564.

Adjustment Board." *Ibid. Buell* therefore confirms that when a cause of action is based on substantive rights independent of the collective bargaining agreement, it is not preempted by the RLA even if parallel claims could also have been brought as minor disputes under the RLA.[19]

The result in *Buell*, moreover, is supported by this Court's prior decisions holding that the RLA does not preempt the States from regulating the working conditions of employees subject to the Act. For example, in *Terminal R.R. Ass'n* v. *Brotherhood of R.R. Trainmen*, *supra*, the Court sustained the Illinois Commerce Commission's order requiring railroads to place cabooses on their trains as a safety measure for the protection of switchmen who performed their duties at the back of

[19] Petitioners suggest (Br. 46 n.28) that *Buell* is inapposite because it reconciled the RLA with another federal statute, rather than with state law. The Court, however, emphasized that the FELA provides "substantive protection * * * independent of the * * * collective-bargaining agreement" (480 U.S. at 565); it did not suggest that a different result would obtain with respect to a state law that similarly provided independent substantive protection to an employee. In any event, other decisions of this Court confirm that Congress did not intend the RLA's grievance machinery to preempt all state regulation of the railroad and airline employment. See pp. 23-26, *infra*.

Buell also undermines petitioners' reliance (Br. 23-24) on the following dicta in *Burley*, 325 U.S. at 723: a minor dispute "relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries." In our view, the Court's reference to an "omitted case" is properly understood as drawing a contrast with a dispute relating to a "particular provision" of the labor contract. An "omitted case," in other words, is a case that arises not from the express terms of the contract, but by implication from practice, usage, or custom. See note 15, *supra*. *Buell* now makes clear that the mere possibility of bringing a grievance on an "omitted case" such as a "claim[] on account of personal injur[y]" (*Burley*, 325 U.S. at 723) does not preempt a separate tort action based on a standard of care independent of the agreement.

moving trains. In so holding, the Court rejected the argument that the state commission's order was preempted by the RLA because the demand for cabooses arose from a dispute between the carrier and its employees, and because the collective bargaining agreement itself contained a provision dealing with the provision of cabooses. The Court "assume[d], without deciding, that the demand for additional caboose service and its refusal constitute a dispute about working conditions, and that the National Railroad Adjustment Board would have jurisdiction of it on petition of the employees or their representatives and might have made an award such as the order in question or some modification of it." 318 U.S. at 6. But the Court reasoned as follows (*id.* at 6-7 (emphasis added)):

> State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. * * * We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which would be of federal concern. *But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question.*

Similarly, in *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, *supra*, the Court rejected the contention that the RLA preempted a state statute "protecting employees against racial discrimination."

372 U.S. at 724.[20] As this Court emphasized, "[n]o provision in the [RLA] even mentions discrimination in hiring," and nothing in the Act "suggests that [it] places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices." *Ibid.* Because the RLA "has never been used for that purpose," this Court found that it did not preempt the state anti-discrimination statute there at issue. *Ibid.*

In light of *Buell*, *Terminal R.R. Ass'n*, and *Colorado Anti-Discrimination Comm'n*, the compulsory arbitration provisions of the RLA do not preempt claims premised on state law duties in areas of legitimate state concern that are independent of duties assumed under the collective bargaining agreement.[21] Given the breadth of the subject matter covered by a typical collective bargaining agreement,[22] petitioners' construction of the RLA

[20] Petitioners suggest (Br. 47-48) that *Colorado Anti-Discrimination Comm'n* is inapposite here because it involved discrimination against prospective employees, and not against incumbents. Nothing in the Court's reasoning, however, suggests that the principle of the case is so limited.

[21] Those decisions foreclose petitioners' reliance (Br. 10) on 45 U.S.C. 152 First, which requires carriers and employees "to exert every reasonable effort * * * settle all disputes, whether arising out of the application of * * * agreements or otherwise." *Ibid.* That provision—which is phrased more broadly than the operative language of Section 153 First (i)—may refer to both major and minor disputes. But even if Section 152 First is read to require the parties (independent of the major dispute mechanism) to try to settle certain issues arising out of the employment relationship but not specifically addressed by the agreement, the decisions discussed in text make clear that Section 153 First (i) of the RLA does not preempt claims based on independent tort duties, rather than on the collective bargaining agreement.

[22] A collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. *The collective agreement covers the whole employment relationship.* It calls into being a new common law—the common law of a particular industry or of a particular plant." *Warrior & Gulf Navigation Co.*, 363 U.S. at 578-579 (citation omitted; emphasis added). For that reason, a vast array of injuries sustained by railroad

would result in a wholesale preemption of state tort law as it applies to employment relationships covered by the RLA. But because "the text of the RLA does not * * * deal with the subject of tort liability" (*Buell*, 480 U.S. at 562), or display any intent to preempt "the field of regulating working conditions themselves" (*Terminal R.R. Ass'n*, 318 U.S. at 7), the RLA should not be construed to preempt States from adopting minimum duties, independent of the collective bargaining agreement, through their law of torts,[23] even if those duties pertain to employees covered by the RLA.[24]

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workers could theoretically be addressed by "the timely invocation of the grievance machinery." *Buell*, 480 U.S. at 564.

[23] That conclusion is supported not only by this Court's decisions construing the RLA in particular, but also by general principles of labor law preemption, which counsel against construing federal statutes to displace the police power of the States. See, *e.g.*, *Fort Halifax Packing*, 482 U.S. at 21, 23 (preemption "should not be lightly inferred," because "establishment of labor standards falls within the traditional police power of the State[s]" and "does not impermissibly intrude upon the collective-bargaining process"); *Lueck*, 471 U.S. at 212 (avoiding interpretation that "would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored").

[24] Petitioners argue (Br. 35) that their claim of preemption is buttressed by *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1651-1657 (1991), which held that an agreement to arbitrate claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, may be judicially enforced. Petitioners contend that *Gilmer* shows that parties may by contract provide for the arbitration of independent claims of statutory right, and that RLA preemption would extend to any such claims brought within the scope of a collective bargaining agreement. For two reasons, *Gilmer* does not assist petitioners here. First, the Court in *Gilmer* took pains to distinguish this Court's prior decisions holding that the arbitration of contract claims does not preclude subsequent judicial resolution of independent statutory claims. Second, the claim in *Gilmer* was subject to the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, and the Court specifically relied on a provision of that Act, 9 U.S.C. 2, making compulsory arbitration clauses enforceable. 111 S. Ct. at 1651, 1657. In contrast,

D. This Court's Decisions Construing Section 301 Of The Labor-Management Relations Act Support The Conclusion That Respondent's Tort Claims Are Not Preempted

Petitioners contend (Br. 39-43) that the Supreme Court of Hawaii erred in relying on *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1986), a case arising under Section 301(a) of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185(a). In our view, however, *Lingle* affords an appropriate framework for addressing the preemption question under the RLA.

Section 301(a) of the LMRA confers jurisdiction on the federal district courts of "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act], or between any such labor organizations." 29 U.S.C. 185(a). Under this Court's decisions, disputes requiring the interpretation of labor contracts covered by Section 301 are governed by federal common law rules that preempt state rules of decision. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). In *Lingle*, the Court addressed the extent to which preemption under Section 301 extends to tort claims arising out of the employment relationship.

Specifically, the Court in *Lingle* held that Section 301 did not preempt a state tort suit based on retaliatory discharge for filing a worker's compensation claim. Noting that the elements of the state law cause of action consisted of (1) dismissal of an employee and (2) a motive to deter or interfere with his filing of a worker's compensation claim, the Court concluded:

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the Federal Arbitration Act explicitly provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. Hence, it has no application here.

> Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge * * *; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement.

486 U.S. at 407. The Court accordingly found that the state tort was "'independent' of the collective-bargaining agreement" because its resolution did "not *require* construing [that] * * * agreement." *Ibid.* (emphasis added).[25]

To be sure, the standard for preemption under *Lingle* (whether a state law claim requires interpretation of a labor contract) is articulated somewhat differently from the standard for finding a minor dispute under *Conrail* (whether a dispute may be conclusively resolved by interpreting the collective bargaining agreement). It is also true that the RLA, unlike the LMRA, affirmatively calls for the arbitration of contract claims within its sweep.[26] Nevertheless, *Lingle* is instructive in the RLA

[25] The Court in *Lingle* emphasized that "even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 purposes." 486 U.S. at 409-410 (footnote omitted).

[26] This distinction between the RLA and the LMRA should not be overstated. In determining when a state tort action is preempted under Section 301, the Court confronted the need to "preserve[] the central role of arbitration in our 'system of industrial self-government.'" *Lueck*, 471 U.S. at 219. It noted that the "need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's [preemption] holding in *Lucas Flour*," and that the standard for LMRA preemption must protect the parties' "federal right to decide who is to resolve contract disputes." *Ibid.* Thus, although RLA preemption

context. This Court has explained that a central purpose of both Section 301 and the exclusive arbitral mechanism of the RLA is to promote the uniform interpretation of collective bargaining agreements and the peaceful, consistent resolution of labor-management disputes. Compare, *e.g.*, *Lingle*, 486 U.S. at 404, 406, and *Lueck*, 471 U.S. at 209-210, with *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 242-243 (1950).

Not surprisingly, therefore, in its decision in *Andrews*, this Court relied on its precedents under Section 301 of the LMRA in holding that the arbitral mechanism of the RLA preempts state law judicial remedies for claims arising out of a collective bargaining agreement. See 406 U.S. at 323; see also *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 692 (1963) ("the [RLA] contract, like the [LMRA] § 301 contract, is a federal contract * * * governed and enforceable by federal law"). By the same token, in its decision in *Lingle*, the Court specifically relied on its RLA decision in *Buell* in determining that a state law retaliatory discharge claim was not preempted by Section 301 because it did not require interpretation of the collective bargaining agreement. See 486 U.S. at 410-411.

In short, the question addressed under the RLA and LMRA preemption cases is common to both statutes: how to accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interest of the States in adopting standards of conduct for employers subject to their police power. Under the RLA, as under the LMRA, a proper accomodation of those interests leads to the conclusion that a state tort law claim for retaliatory discharge is not preempted.[27]

protects a direct statutory right to arbitration, LMRA preemption protects the important statutory right to contract for an arbitral remedy.

[27] Compare, *e.g.*, *Lingle*, 486 U.S. at 409 (LMRA "says nothing about the substantive rights a State may provide to workers when

CONCLUSION

The decision of the Supreme Court of Hawaii should be affirmed.

Respectfully submitted.

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APRIL 1994

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adjudication of those rights does not depend upon the interpretation of [labor] agreements"), and *Lueck*, 471 U.S. at 212 (LMRA "does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law," and does not preempt "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract"), with *Colorado Anti-Discrimination Comm'n*, 372 U.S. at 724 (RLA does not preempt state anti-discrimination law). We therefore agree with those lower court decisions holding that *Lingle* offers an appropriate framework for analyzing RLA preemption of state law tort actions. See, *e.g.*, *Anderson* v. *American Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993) (applying *Lingle*); *Davies* v. *American Air Lines, Inc.*, 971 F.2d 463, 466-467 (10th Cir. 1992) (same), cert. denied, 113 S. Ct. 2439 (1993); *O'Brien* v. *Consolidated Rail Corp.*, 972 F.2d 1, 4 (1st Cir. 1992) (same), cert. denied, 113 S. Ct. 980 (1993); *Maher* v. *New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 758 (N.J. 1991) (same). But see, *e.g.*, *Hubbard* v. *United Airlines, Inc.*, 927 F.2d 1094, 1097 (9th Cir. 1991) (*Lingle* does not govern in RLA cases); *Lorenz* v. *CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (same).